No. 87-1137

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

JAMES D. KIRK,

Petitioner,

vs.

MICHAEL REESE HOSPITAL AND MEDICAL CENTER, IRVING H. TRACER, M.D., HENRY K. FINE, M.D., E.R. SQUIBB & SONS, INC., AND SMITHKLINE CLINICAL LABORATORIES, INC.,

Respondents.

BRIEF IN OPPOSITION OF E.R. SQUIBB & SONS, INC.

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BRIEF IN OPPOSITION OF E.R. SQUIBB & SONS, INC.

Respondent, E.R. Squibb & Sons, Inc.* (hereinafter "Squibb") respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Illinois Supreme Court's opinion in this case. That opinion is reported at 117 Ill.2d 507, 513 N.E.2d 387.

*E.R. Squibb & Sons, Inc. is a wholly-owned subsidiary of Squibb Corporation.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE ILLINOIS SUPREME COURT'S DECISION TO HEAR THE CASE ON ITS MERITS DID NOT INFRINGE ANY FEDERAL RIGHTS OF PETITIONER

A. Petitioner's Claim Was Waived In The State Proceedings And Was Not Preserved For Review By This Court

Petitioner's contention that the Illinois Supreme Court should not have decided the merits of this case was waived by petitioner. Although he now seeks to assert a federal question, that question has not been preserved for review. This Court does not have jurisdiction to review the question petitioner seeks to raise because that question was not raised and decided in the state court. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

The petition omits certain facts which show that the issues petitioner now seeks to raise were waived by him below. Petitioner did not file an answer to any of the petitions for leave to appeal which were filed in the Illinois Supreme Court. Such an answer is expressly permitted by Illinois Supreme Court Rule 315(e). Ill.Rev.Stat., 1985, ch. 110A Par. 315(e). More importantly, although he now seeks to challenge the Illinois Supreme Court's granting of respondents' motions for leave to file a motion for reconsideration and motion for reconsideration, petitioner did not file any objection to those motions when they were filed. Those motions were filed and served by mail on February 24, 1986 and not ruled upon until March 18, 1986. If petitioner wished to object to the procedure sought by the motions he had more than ample opportunity to file his objections prior to the Court's ruling.

Additionally, petitioner did not object to the Illinois Supreme Court's reconsideration of the case on the merits either in his brief to the Court or at oral argument. It was not until after the Court had filed a decision on the merits

adverse to petitioner that, in a petition for rehearing, petitioner first asserted that the Illinois Supreme Court should not have decided the case on the merits. Having acquiesced and participated in the proceedings in the Illinois Supreme Court without objection, petitioner cannot now complain. *Hood v. Commonwealth Trust and Savings Bank*, 376 Ill. 413, 422, 34 N.E.2d 414 (1941). The issue of whether the Illinois Supreme Court should decide the merits of the case was waived in the Illinois Supreme Court, and therefore not addressed by it. *See, Kravis v. Smith Marine, Inc.*, 60 Ill.2d 141, 147, 324 N.E.2d 417 (1975). Because that issue was not properly raised in State Court and not decided by the State Court, petitioner is barred from asserting it in this Court. *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *Beaty v. Richardson*, 276 U.S. 599 (1928).

Petitioner could have objected when leave to file a motion for reconsideration was sought and also could have objected to review on the merits when the case was briefed and argued in the Illinois Supreme Court. Petitioner had ample opportunity to raise his claim long before he filed a petition for rehearing to the Illinois Supreme Court. Hence, that petition for rehearing is insufficient to raise the question; it does not provide a basis for the exercise of jurisdiction by this Court. *Herndon v. Georgia*, 295 U.S. 441, 443-446 (1935).

B. Petitioner's Claim Is Wholly Without Merit

There is absolutely no merit to petitioner's claim that he was denied due process by the Illinois Supreme Court's decision to reconsider its denial of leave to appeal. Since the early days of our nation this Court has recognized that the establishing of courts of justice, the appointment of judges, and the making of regulations for the administration of justice within each state, according to its laws, on all subjects not entrusted to the federal government, is the province of each state. *Calder v. Bull*, 3 U.S. 38, 387, 3

Dall. 386, 387 (1798). *See also, Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

Petitioner is incorrect in his claim that the Illinois Supreme Court failed to comply with its rules and therefore has somehow violated petitioner's right to due process. On February 6, 1986 the Illinois Supreme Court filed its opinion in *Johnson v. Colley*, 111 Ill.2d 468, 490 N.E.2d 685 (1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 113, 93 L.Ed.2d 60 (1986). In that decision the same contention asserted by petitioner was addressed. The Court recognized that its standing order instructed the Clerk not to accept or file motions for reconsideration of a denial of leave to appeal, but held that this standing order was not a statement of the Court's infallibility. The Court stated that under the Illinois Constitution it had rulemaking authority sufficiently comprehensive to regulate all aspects of appellate process. *Id.* 111 Ill.2d at 472. The Court stated:

> Recognizing that our authority stems from the Constitution and not from our infallibility, and consistent with precedent (see *Leathe v. Thomas* (1908) 233 Ill. 430), this court, on several occasions, has allowed a motion filed in accordance with Rule 361 (87 Ill.2d R. 361) for leave to file a motion for reconsideration.
>
> *Id.* at 472.

Following that decision, the 1979 order relied upon by petitioner must be read as an order to the Clerk not to file a motion for reconsideration of denial of leave to appeal unless leave to file it has been granted by the Court.

In the present case respondents filed their motion for leave to file a motion for reconsideration more than two weeks after the Court had filed its decision in *Johnson v. Colley*, *supra*. Being familiar with that decision, respondents followed the procedure set forth in it. The Court was not in session and therefore Illinois Supreme Court Rule 361(c)2 Ill.Rev.Stat., 1985, ch. 110A Par. 361(c)2 was applicable. Notwithstanding petitioner's statement to the con-

trary (Petition p. 4), in accordance with Rule 361 respondents mailed the original of their motions to the Clerk of the Illinois Supreme Court with copies to each of the justices at his district chambers. Those motions and the manner in which they were filed and served fully complied with Illinois Supreme Court Rule 361.

Plaintiff's reliance on *Rubin v. Kohn*, 344 Ill. 166, 172, 176 N.E. 259 (1931) is misplaced. That decision does refer to denial of leave to appeal as a final adjudication. But, contrary to plaintiff's statement at page 9 of the petition, that decision does not hold that denial of leave to appeal leaves no jurisdiction for further proceedings. Indeed, as the Court pointed out in *Whitcanock v. Nelson*, 81 Ill.App.3d 186, 189, 400 N.E.2d 998 (2d Dist. 1980), when the mandate has not issued, the appellate courts of Illinois retain jurisdiction to reconsider their orders. In the present case the mandate had not issued and the Illinois Supreme Court unquestionably had jurisdiction.

Petitioner cannot claim that he did not have an opportunity to be heard. He clearly could have opposed respondents motion for leave to file a motion for reconsideration. Petitioner cannot claim he was treated differently than other parties. He was treated exactly the same as the plaintiff in *Johnson v. Colley, supra*, where the Court held that the procedure of which petitioner complains did not violate due process.

Petitioner's claim that allowing respondents to follow the procedure authorized by the Court in *Johnson v. Colley, supra* impermissibly creates two classes of lawyers is patently absurd. (Petition p. 11). Respondents followed a procedure authorized by a published opinion. It is neither a secret nor improper.

In short, petitioner's claim seems to be that he lost so therefore he must have been denied due process and equal protection. This claim is wholly without merit.

II. DISMISSAL OF PETITIONER'S COMPLAINT DID NOT DENY HIM PROCEDURAL DUE PROCESS

A. Petitioner Waived This Claim In The State Trial Court And It Is Therefore Not Properly Before This Court

As discussed in section I.A. of this response, there is no jurisdiction to review a federal question unless that question was both raised and decided in the state court. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

Petitioner now claims that the trial court's dismissal of the complaint on motion denied him procedural due process. But that claim was not made in the trial court. Therefore it was waived and may not be raised on review. *Shell Oil Co., v. Department of Revenue*, 95 Ill.2d 541, 550, 449 N.E.2d 65 (1975). Because this issue could have been raised in the trial court, petitioner's inclusion of it in his petition for rehearing almost six years later is not sufficient to create jurisdiction in this Court. *Herndon v. Georgia*, 295 U.S. 441, 443-446 (1935).

B. Petitioner Was Not Denied An Opportunity To Present Either His Theory Of The Case Or Evidence Relevant To The Issues Decided By The Court

Section II of the petition asserts that petitioner was denied procedural due process because the trial court granted respondents' motions to dismiss. Petitioner claims that he should have had an opportunity to introduce evidence. But it was petitioner who refused to specify any factual basis for his theory, and the issue on which petitioner claims a right to introduce evidence is not an issue that was decided by the Illinois Courts. The evidence petitioner claims a right to present is irrelevant to the basis on which the case was decided.

Illinois law requires fact pleadings. To state a good cause of action a plaintiff must set forth in the complaint

facts necessary for recovery under the theory asserted by him. *Teter v. Clemens*, 112 Ill.2d 252, 492 N.E.2d 1340 (1986); Majority Opinion, 117 Ill.2d at 516, Petition App. pp. 4a-5a. In the present case petitioner not only failed to plead facts sufficient to support a claim of failure to warn, petitioner refused to do so. In the trial court Squibb asserted in its motion to dismiss that petitioner was required to plead some fact that, if true, would show Squibb's written warnings to be inadequate. Petitioner responded as follows:

> In an earlier memoranda plaintiff acknowledges these warnings were discussed, but have not conceded anything in this regard. It is obvious defendant is merely fishing for an admission or denial of a theory from the plaintiff, however no response will be forthcoming from the plaintiff in this regard, as plaintiff is under no obligation to do so.
>
> (R. C 605).

The first sentence in Squibb's written warning states: "The use of this drug may impair the mental and physical abilities required for driving a car or operating heavy machinery." (R. C412, R. C430). Throughout the proceedings in the trial court, including the hearing at which the trial court granted Squibb's motion to dismiss, petitioner's only assertion as to why this warning was inadequate was that Squibb did not communicate it directly to the patient. At that hearing petitioner's counsel also conceded that petitioner had not alleged what was inadequate about the warnings provided by Squibb. *Report of Proceedings*, September 3, 1981 pp. 35-36.

In other words, petitioner was not denied an opportunity to present evidence on any issue of disputed fact. The Courts below ruled on the basis of the allegation that Squibb and SmithKline did not warn the patient directly, but communicated their warnings to the physician. Later, plaintiff conceded and the Illinois Supreme Court held that,

as a matter of law, pharmaceutical manufactures need warn only physicians of the risks associated with their prescription drugs. Hence, dismissal was not based upon a question of fact but an issue of law where presentation of evidence was not relevant.

Contrary to petitioner's assertion, the Illinois Supreme Court did not decide the adequacy of Squibb's warnings. The Court expressly stated that it need not consider the adequacy of the warnings unless plaintiff can meet the "reasonable foreseeability" requirements of strict liability. (Petition App. at 7a-8a). The Court held that, without deciding the adequacy of the warnings, the facts alleged in the complaint demonstrate on their face that plaintiff would never be entitled to recover. (Petition App. at 9a). The Court held that regardless of the adequacy of the warnings they provided to the physicians, Squibb and SmithKline could not have reasonably foreseen that their drugs would be dispensed without those warnings. (Petition App. 9a).

In short, petitioner did not plead any facts that would support a claim of failure to warn adequately. Moreover, the case was not decided on the basis of the adequacy of the warnings. The evidence petitioner now claims a right to introduce had no relevance to the disposition of the case. There is no merit to petitioners claim that his inability to introduce that evidence somehow denied him due process.

III. THE ILLINOIS SUPREME COURT'S DECISION WAS BASED ON STATE LAW – – NOT FEDERAL LAW.

The present case was decided by the Illinois Courts on the basis of state tort law. No federal rights were decided. Hence, there is no basis for review of that decision by this Court. *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945); *Michigan v. Long*, 463 U.S. 1032, 1038-1042 (1983).

CONCLUSION

For the above stated reasons, respondent, E.R. Squibb & Sons, Inc., respectfully urges this Honorable Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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